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No. 687

In the Supreme Court of the United States

OCTOBER TERM, 1963

EDWARD T. ROEHNER,
Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

EDWARD T. ROEHNER, *pro se.*
507 Fifth Avenue,
New York 17, N. Y.

Of Counsel
Sheila M. Roehner

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

Edward T. Roehner petitions for a writ of certiorari to review the order of the New York Supreme Court, Appellate Division, First Judicial Department, entered in the office of the Clerk of the Appellate Division on May 16, 1963, unanimously affirming, without opinion, an order of the Supreme Court, New York County, Special Term, entered in the office of the Clerk of New York County on January 30, 1963, and the judgment entered thereon on February 26, 1963.

OPINIONS BELOW

The New York Appellate Division, First Judicial Department, rendered no opinion. The Supreme Court, New York County, Special Term, rendered an opinion

which appeared in the *New York Law Journal* on January 15, 1963. (Appendix A, *infra*, p. 12.) The opinion is not reported.

JURISDICTION

The final order of the New York Supreme Court, Appellate Division, First Judicial Department, was entered on May 16, 1963. (Appendix C, *infra*, p. 19.) Thereafter petitioner asked leave of the Appellate Division, First Judicial Department, to reargue or to appeal to the New York Court of Appeals. (Appendix D, *infra*, p. 21.) Leave was denied on June 25, 1963. (Appendix E, *infra*, p. 25.) Petitioner then sought leave of the New York Court of Appeals to appeal to it. Leave was denied on October 3, 1963. (Appendix F, *infra*, p. 27.) The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

Petitioner in his application to the Appellate Division, First Judicial Department, for rehearing, or for leave to appeal, stated that he was denied due process of law in violation of his rights under the Fourteenth Amendment of the Constitution of the United States. He asked the Appellate Division to state in its order that the constitutional question was presented and necessarily passed upon. (Appendix D, *infra*, at p. 24.) The order denying petitioner's motion did not so state. (Appendix E, *infra*, p. 25.)

In his motion to the New York Court of Appeals for leave to appeal, pp. 26-27, petitioner asked the Court, if his motion was denied, to state in its order that there was necessarily raised and passed upon the question whether petitioner was denied due process under the Fourteenth Amendment of the Constitution of the

United States. The order, which denied petitioner's motion, did not so state. (Appendix F, *infra*, p. 27.)

QUESTION PRESENTED

Did the New York Supreme Court, New York County, Special Term, violate the due process clause of the Fourteenth Amendment of the Constitution of the United States (in this action to enjoin respondent from continuing to collect an increase in dues on the grounds that, to obtain the increase, respondent had

(1) shown surplus as less than $1,000, instead of more than $110,000, by omitting the surplus reserves of over $110,000, and

(2) falsely stated that there was a loss for the year)

when Special Term—taking judicial notice (in contradiction to the record) that surplus reserves are not part of surplus—

(1) granted respondent's motion for summary judgment,

(2) did not pass on, or even allude to, the ground that the income figures were materially false, which had uncontradicted support in the record, and

(3) rebuked petitioner for having brought this action.

In form the question presented has been stated, but in substance the question is whether petitioner's reputation as a lawyer is to be sacrificed to protect respondent from the consequences of its reckless misconduct.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment, § 1:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

STATEMENT

Respondent sent its members a four-page letter dated February 13, 1957, urging them to vote an increase in dues at the meeting on March 12, 1957. (R. 20-25.) The financial statement on the last page, rounded off to the nearest thousand dollars, showed no surplus and the income figure, projected at May 1, 1956, the beginning of the fiscal year, showed a deficit for the fiscal year ending April 30, 1957, of $5,000. (R. 25.)

At the meeting on March 12, 1957, petitioner questioned the absence of a surplus. (R. 28.) The treasurer, Mr. Dean K. Worcester, answered that there was none, and that a deficit was expected for the current year. (R. 28.) Petitioner then asked for more recent income figures than the estimate at May 1, 1956 (more than ten months earlier), of a deficit of $5,000. (R. 29-30, 42-43.) Mr. Worcester then read off what he said were the figures for the preceding ten months. They showed a deficit greater than the projected deficit of $5,000 on May 1, 1956. (R. 43.) The increase was carried by a vote of 80 to 10. (R. 31.)

At the next meeting, May 1957, when the correctness of the March 1957 minutes was up for discussion, petitioner arose, with the 1957 Year Book in his hand, and asked Mr. Worcester to explain why the financial statement had shown a zero surplus when the Year

Book showed more than $110,000 in reserves for extraordinary repairs and contingencies. (R. 57.) Mr. Louis M. Loeb, the president, asked petitioner to put the question over to the next meeting. (R. 57.) Since the room was crowded with representatives of foreign nations because Dag Hammarsjköld, Secretary-General of the United Nations, was being made an honorary member, petitioner immediately agreed. (R. 57-58.) When the minutes of the May meeting were submitted at the next meeting, in October, however, they read:

> "Mr. Edward T. Roehner raised a question from the floor with regard to the correctness of certain aspects of the Treasurer's report. The Chair suggested to Mr. Roehner that he make contact with the Treasurer at a later date and clear the matter up in that manner. Mr. Roehner agreed to do so." (R. 62-63.)

Petitioner said that that was incorrect, but Mr. Loeb said that that was how the minutes were going to read, and he was sustained. (R. 63.)

Petitioner instituted this action to enjoin the defendant from continuing to collect the increase in dues on the ground that it was obtained through fraud. His verified complaint stated that instead of surplus of less than $1,000 shown on the financial statement, surplus was more than $110,000, and that instead of a loss for the year there was net income of more than $15,000.

The verified answer denied the allegations of the complaint on information and belief.

Petitioner moved to strike the verified answer as sham. (R. 49.) On the return day respondent stated that an amended answer had been mailed to petitioner the preceding day and therefore the motion fell. (R.

(50.) The difference between the two answers is that the amended answer omitted "on information and belief" from the preamble. (R. 50.) Case law on this exact point was that the motion did not fall, for the omission of the words "on information and belief" raised no new issue. (R. 51.) The Supreme Court, New York County, held however, that since an amended answer had been filed the motion fell. (R. 51.) The difference in New York practice between a motion to strike an answer as sham and a motion for summary judgment is that on a motion to strike an answer as sham the plaintiff must establish the falsity of the answer beyond doubt, while on a motion for summary judgment the plaintiff need only show evidence that will sustain his complaint and state his belief that there is no defense to the action. The defendant must then show by evidence an arguable defense. (R. 49.)

Respondent then moved for summary judgment. Three affidavits supported the motion. The affiants were Mr. Louis M. Loeb and Mr. Dean K. Worcester, who had been president and treasurer, respectively, at the March, May, and October, 1957 meetings, and Mr. Robert Coulson, the secretary. Exhibits were annexed to all three affidavits. In its order granting respondent's motion for summary judgment (Appendix B, *infra*, p. 2a) the Supreme Court, New York County, did not recite the exhibits annexed to the affidavits of Mr. Loeb and Mr. Worcester, and they are therefore not part of the record. Their exhibits were not properly usable on a motion for summary judgment. For example, the exhibits annexed to Mr. Loeb's affidavit purported to be reports to the executive committee of respondent of a special committee on membership ap-

pointed by him, and certain minutes of the executive committee. (R. 43-44.)

All that Mr. Loeb stated in his affidavit was that he had been president of respondent from 1956-1958. (R. 32-33.) All that Mr. Worcester said in his affidavit that was pertinent to the issue was that he had been treasurer of respondent from 1956-1960. (R. 34-36.) Neither one of them denied the allegations in the verified complaint, nor did either of them file a replying affidavit when petitioner repeated those allegations, with supporting evidence, in his affidavit in opposition to the motion for summary judgment. Nothing in either affidavit supported the allegations in the verified answer.

The third affiant, Mr. Coulson, the secretary, did not pretend to have personal knowledge of the facts. He merely annexed to his affidavit notices of meetings, extracts from the minutes, and the four-page letter containing the financial statement. (R. 16-31.) The Supreme Court, New York County, recited those exhibits in its order granting respondent's motion for summary judgment. (Appendix B, *infra*, at p. 17.)

Petitioner, in his affidavit in opposition to the motion for summary judgment, stated that the reserves for extraordinary repairs and contingencies of over $110,000 were part of surplus, and that beginning with the year 1960, when the balance sheet of respondent first used the caption "Surplus," the reserves for extraordinary repairs and contingencies were listed as part of surplus. (R. 46.)

Although there was no evidence by respondent in support of its motion for summary judgment, the Supreme Court, New York County, by taking judicial

notice, although it did not so state, granted the motion on the ground, as to which the only evidence in the record was contrary, that the reserves for extraordinary repairs and contingencies were not part of surplus, and that therefore respondent had not misstated surplus in the financial statement when it showed surplus as less than $1,000. Special Term rebuked petitioner for having brought the action. (Appendix A, *infra*, p. 12.) The Supreme Court, New York County, did not pass on, or even allude to, petitioner's sworn statements regarding the falsity of the income figures.

The Appellate Division, First Judicial Department, affirmed without opinion. (Appendix C, *infra*, p. 19.) In his affidavit in support of his motion for reargument, or for leave to appeal to the New York Court of Appeals, petitioner contended that he had been denied due process in violation of his rights under the Fourteenth Amendment of the Constitution of the United States. He asked that the order state that the constitutional question was presented and necessarily passed upon. (Appendix D, *infra*, at p. 24.) The order, which denied petitioner's motion, did not so state. (Appendix E, *infra*, p. 25.)

In his motion to the New York Court of Appeals for leave to appeal, pp. 26-27, petitioner asked the Court, if his motion was denied, to state in its order that there was necessarily raised and passed upon the question whether petitioner was denied due process under the Fourteenth Amendment of the Coistitution of the United States. The order, which denied petitioner's motion, did not so state. (Appendix F, *infra*, p. 27.)

REASONS FOR GRANTING THE WRIT

Unless the writ is granted, petitioner's reputation as a lawyer will be sacrificed, in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States, to protect the respondent from the consequences of its reckless misconduct.

Petitioner sued to enjoin respondent from continuing to collect an increase in dues obtained through falsely representing its surplus as less than $1,000, instead of more than $110,000, and falsely stating that there would be a loss for the year.

On a motion for summary judgment by respondent the New York Supreme Court, New York County, Special Term, did not decide the motion on the basis of respondent's supporting affidavits, for there was no support for the motion in the affidavits. The affidavits in support of the motion contradicted none of the allegations of the complaint. Instead, the Supreme Court, New York County—with no support in the record, in the face of petitioner's uncontradicted sworn statement in the record that reserves for extraordinary repairs and contingencies were part of surplus, and with the record showing that when respondent used the caption "Surplus" on its balance sheet it showed the reserves for extraordinary repairs and contingencies as part of surplus—took judicial notice, although it did not so state, that the reserves were not part of surplus, and held that respondent had therefore correctly stated the amount of surplus in its financial statement used to obtain the increase in dues. Moreover, a reserve for extraordinary repairs and contingencies is not a fund earmarked for a particular purpose, as the Supreme Court, New York County, said. It is a fund created

for undetermined contingencies. Even if it were a fund earmarked by the executive committee of respondent for a particular purpose, it would still be part of surplus, returnable to unappropriated surplus at the will of the executive committee. This is not a matter of opinion among accountants; it is accepted by all accountants. See Montgomery's *Auditing* (8th ed, 1957), the authors of which are partners in Lybrand, Ross Bros. & Montgomery, respondent's auditors, pages 399-402, according to which reserves for extraordinary repairs and contingencies are always part of surplus.

The Supreme Court, New York County, did not decide, or even allude to, petitioner's other ground, that the loss for the year shown in the financial statement, increased by the treasurer at the meeting at which the increase was voted, was false.

Not content with deciding the motion against petitioner, who on the record was clearly entitled to have the motion granted in his favor as a matter of law, the Supreme Court, New York County, rebuked petitioner for having brought the action.

Respondent, a bar association, violated common standards of honesty in dealing with its members. If a business corporation falsified its financial statement as respondent did, and compounded its offense by falsely informing the stockholders at the meeting that the loss was greater than forecast in the financial statement, when in fact there was income, the officers would be regarded as having violated common standards of decency; perhaps as having done something worse.

But when petitioner sought to hold respondent, a bar association, which should be held to something stricter, to common standards of honesty in dealing with its

members the Supreme Court, New York County—in defiance of the record and of the due process clause of the Fourteenth Amendment of the Constitution of the United States—granted respondent's motion for summary judgment; and, not content with that, has gravely injured petitioner's reputation as a lawyer by rebuking him for having brought baseless charges of fraud against respondent.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD T. ROEHNER, *pro se*,
507 Fifth Avenue,
New York 17, N. Y.

Of Counsel:
SHEILA M. ROEHNER

December, 1963

APPENDIX A

OPINION OF CAPOZZOLI, J.

(New York Law Journal, January 15, 1963, p. 14)

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM—PART 1

CAPOZZOLI, J.

Rochner v. Association of the Bar of the City of N. Y.—The plaintiff and the defendant have both moved for summary judgment. The essential facts are not in dispute.

Defendant, the Association of the Bar of the City of New York, is a membership corporation organized by special act of the Legislature for the "purposes of cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession, and cherishing the spirit of brotherhood among the members thereof."

Plaintiff, a lawyer, has been a member of the defendant association since 1949. He has brought this action demanding judgment enjoining the defendant from collecting, for the fiscal year beginning May 1, 1958, and thereafter, the increase in dues voted in 1957, upon the ground that when the increase in dues was voted the defendant, in order to show necessity for the increase, presented to the members of the association a false statement of defendant's financial condition. Specifically, plaintiff charges that that financial state-

ment circulated by the defendant, in support of its plea for an increase in dues, falsely stated that the surplus at the beginning of the fiscal year ending April 30, 1957, was zero, whereas, the accounting firm that audited defendant's books had certified a surplus of $110,491.75 for the fiscal year ended April 30, 1956.

An examination of the balance sheet for the period in question reveals a "reserve for extraordinary repairs and contingencies" on the Association Building of $44,955.12 and on the Bar Building of $65,062.24 and a "current funds surplus" of $474.39. This totals $110,491.75, the surplus amount which plaintiff claims was fraudulently kept from the membership. In transferring the $474.39 surplus figure to the financial statement it appears that the sum was rounded off to zero dollars, consistent apparently with the practice used throughout the statement, rounding figures off to the nearest $1,000.

The theory of plaintiff's action is fraud on the part of the defendant. The essential constituents of an action for fraud are representation, falsity, scienter, deception and injury (Ochs v. Woods, 221 N. Y. 335; Reno v. Bull, 226 N. Y. 546). Bad faith and not negligence lies at the basis of an action for fraud. The defendant must know his statement to be false. * * * Fraud presupposes a wilful purpose resorted to with intent to deprive another of his legal rights. It is positive in that the purpose concurs with the act, designedly and knowingly committed. * * * (Reno v. Bull, supra, at p. 551).

The failure to include the reserve for extraordinary repairs and contingencies in the surplus amount is neither unlawful nor uncommon. Organizations of the

type of the defendant frequently earmark funds for a particular purpose and separate them from total surplus. There is no showing in the papers submitted by the plaintiff, in support of his motion, that this is not a standard or a usual accounting practice. In the area of accounting, a wide discretion is left to the practitioner in the selection of methods and in the determination as to which of several practices or principles is most sound or best suited for the work undertaken. What appears in this case, therefore, is at best a difference of opinion as to how the accountant should have listed the figure in question. But, certainly, this is not fraud as the law understands it. So long as there is a reasonable basis for the method selected, its selection does not constitute fraud, in the absence of a clear showing of bad faith.

It is also noteworthy that, at the meeting of March 12, 1957, which had before it this question of increasing the dues, plaintiff was present and, according to the minutes of that meeting, excerpts of which have been made part of the defendants' moving papers, the plaintiff spoke twice in opposition to the increases in dues. He then urged that the financial statement, upon which the members were acting, was not accurate and that, while the statement claimed a lack of surplus, the plaintiff asserted that, in fact, there was a surplus. The motion to increase the dues was carried, despite the opposition of the plaintiff.

In resisting the motion of the defendant for summary judgment, it is incumbent upon the plaintiff to marshal his proof and, by affidavits and documents containing evidentiary facts, establish the presence of questions of fact which would automatically defeat the

motion (Pribyl v. Van Loan & Co., Inc., 261 App. Div. 563; Metropolitan Fuel Distributors v. Coogan, 277 App. Div. 138; May v. Prudefftial Insurance Co., 93 N. Y. S. 2d 579). It does not appear that plaintiff has met this burden.

Fraud is a serious charge and, where it is made, plaintiff should be prepared to show that there is enough evidence in his possession to indicate at least an issue of fact with respect thereto. Conclusory allegations and unsupported charges do not take the place of evidentiary facts. While the papers of the plaintiff are replete with many extraneous matters, which are completely irrelevant to the issues raised between the parties, they are lacking in evidentiary facts which are necessary in order to defeat the motion of the defendant.

For the foregoing reasons defendant's motion for summary judgment is granted and the cross-motion of the plaintiff is denied. Settle order.

Roehner v. Ass'n of the Bar, City of N. Y.—Motion is disposed of in accordance with the decision filed herewith.

APPENDIX B

ORDER OF NEW YORK SUPREME COURT, NEW YORK COUNTY SPECIAL TERM

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, Pearl and Center Streets, in the Borough of Manhattan, City of New York, on the 30th day of January, 1963.

PRESENT: HON. LOUIS J. CAPOZZOLI, Justice.

No. 16594, 1962

EDWARD T. ROEHNER,

Plaintiff,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Defendant.

Defendant having moved by notice of motion dated November 26, 1962 for summary judgment under CRP 113 dismissing the complaint on the ground that the action has no merit and defendant [plaintiff] having moved by cross motion included in his answering affidavit sworn to December 4, 1962 for summary judgment striking the amended answer and directing entry of judgment for plaintiff on the cause of action pleaded in the complaint;

Now, upon reading and filing the notice of motion, the complaint verified September 20, 1962, the amended

answer verified November 7, 1962, the affidavits of Robert Coulson, with exhibits annexed, Louis M. Loeb and Dean K. Worcester sworn to November 20, 1962, the Year Book of the Association of the Bar of the City of New York for the year 1957 limited to the by laws therein contained, the affidavit of Robert Coulson sworn to December 6, 1962 in support of defendant's motion for summary judgment and in opposition to plaintiff's cross motion for summary judgment, the affidavits of Edward T. Roehner sworn to December 4 and 8, 1962 with exhibits A to D annexed in opposition to defendant's motion for summary judgment and in support of plaintiff's cross motion for summary judgment and the motion and cross motion having regularly come on to be heard at Special Term, Part I of the Court on December 10, 1962 and after hearing James H. Halpin, attorney for defendant, in support of defendant's motion for summary judgment and in opposition to plaintiff's cross motion for summary judgment and Edward T. Roehner appearing *pro se* in opposition to defendant's motion for summary judgment and in support of plaintiff's cross motion for summary judgment and due deliberation having been had thereon and the opinion of the Court having been filed herein

Now, on motion of James H. Halpin, attorney for defendant, it is

Ordered, that defendant's motion for summary judgment be and the same hereby is in all respects granted, that the complaint be and it hereby is dismissed and that judgment be entered herein in favor of defendant and against plaintiff, dismissing said complaint on the merits, and it is further

ORDERED, that plaintiff's cross motion for summary judgment be and the same hereby is in all respects denied.

ENTER

L. J. C.
J. S. C.

FILED
Jan. 30, 1963
New York
County Clerk's Office

APPENDIX C

ORDER OF AFFIRMANCE ON APPEAL FROM ORDER AND JUDGMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 16th day of May, 1963.

PRESENT—HON. CHARLES W. BREITEL,
Justice Presiding.
" JAMES B. M. MCNALLY,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER,
" ARON STEUER,
Justices.

5981

EDWARD T. ROEHNER,
Plaintiff-Appellant,

vs.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
Defendant-Respondent.

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County, entered in the 30th day of January, 1963, granting summary judgment to defendant and denying plaintiff's cross-motion for summary judgment, and from the judgment entered in the office of the Clerk of the County of New York on the 28th day of

February, 1963, and said appeal having been argued by Sheila M. Roehner of counsel for the appellant, and by Mr. James H. Halpin of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the judgment and order so appealed from be and the same are hereby, in all things, affirmed; and that the respondent recover of the appellant the costs of this appeal.

Enter.

VINCENT MASSI
Clerk

APPENDIX D

APPLICATION FOR REARGUMENT OR LEAVE TO APPEAL

NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

EDWARD T. ROEHNER
Plaintiff-Appellant,

v.

THE ASSOCIATION OF THE BAR
THE CITY OF NEW YORK,
Defendant-Respondent.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

EDWARD T. ROEHNER, being duly sworn, says that he is the attorney for the plaintiff.

This is an action to enjoin the defendant from continuing to collect an increase in dues, the gravamen being that the increase was obtained through fraud.

An order by Mr. Justice Capozzoli granting the defendant's motion for summary judgment and denying the plaintiff's cross-motion for summary judgment was entered in the office of the clerk of the County of New York on January 30, 1963, and judgment thereon was entered in the office of the said clerk on February 26, 1963.

The appeal from the order and the judgment was argued to this Court on May 8, 1963. The Court unanimously affirmed the order and the judgment, without opinion, by an order filed in this Court on May 16, 1963. Judgment of affirmance was entered in the office of the Clerk of the County of New York on May 23, 1963.

Affiant moves for reargument or, in the alternative, for leave to appeal to the Court of Appeals on the following grounds.

Mr. Justice Breitel, the Justice Presiding at the argument of this appeal on May 8, 1963, said in *Legal Institutions Today and Tomorrow* (1959) 5:

> "The judges are detached, disinterested and independent. But their judgment must be rationally supported or supportable. They must justify or be able to justify the rightness of their decision. This they must do on the basis of the law given or deducible from the decisional precedent system or from the statute."

By that standard the order of affirmance was erroneous, for the order is not rationally supportable. There is not a scintilla of evidence in the record to support the grant of summary judgment to the defendant by Mr. Justice Capozzoli.

When the case was called in this Court, Mr. Justice Breitel, the Justice Presiding, told Sheila M. Roehmer, Esq., who was arguing the appeal, that three of the members of the panel, he, Mr. Justice McNally, and Mr. Justice Steuer, were judicial members of the defendant. She waived any objection on that ground. But most certainly judicial sensitivity demanded, since she had waived objection to the qualification of the three judges and thereby shown her faith in the integrity of this Court, that the Court show reason for affirming an order for summary judgment completely without support in the record.

The New York Law Journal, June 3, 1963, carries the address by Dr. Goodhart at the banquet given by the American Judicature Society in honor of the Supreme Court of the United States. He said of English judges (third column, third full paragraph): "These judges are independent, but they are never arbitrary. There are three things in the common law system that prevent this: . . . The second point of great importance is that

the judges give reasons publicly for their judgments. . . ." Whatever reasons there may be for this Court affirming without opinion in other cases, no reason can possibly justify the absence of an opinion in a case in which three of the five members of the panel are judicial members of the defendant, and the Court itself considered that membership as ground for disqualification absent a waiver by plaintiff's counsel.

The only facts stated in the affidavits of Louis M. Loeb and Dean K. Worcester, the only affiants in support of the motion who had personal knowledge of the facts, were the years they held the offices of president and treasurer, respectively, of the defendant, Worcester adding that he had prepared the letter which is the basis of this action and stating what he said were the sources he had used in preparing it. The exhibits annexed to their affidavits were not recited in the order of Mr. Justice Capozzoli; they had no place in a motion for summary judgment. The remaining affiant, Robert Coulson, the current secretary of defendant, made no pretense to personal knowledge.

Mr. Justice Capozzoli in his opinion discussed only one of the allegations in the complaint in support of the charge of fraud: That, although there was over $110,000 in reserves for extraordinary repairs and contingencies, the financial statement submitted to the membership showed no surplus. Such reserves are always part of surplus; in fact, the record shows that beginning with the year 1960, when the defendant first included the caption "Surplus" in its financial statement in the Year Book, it listed these reserves as part of "Surplus." (fol. 138)

Mr. Justice Capozzoli agreed with plaintiff that there were reserves for extraordinary repairs and con-

tingencies in the sum alleged by plaintiff. This finding would seem to lead inexorably to a decision in favor of plaintiff. Instead, with nothing in the record to support him, in the teeth of the record, in defiance of unanimous accounting practice, including that of the defendant, and with no citation of authority, Mr. Justice Capozzoli held that the reserves were not part of surplus, and therefore the action fell.

His failure to refer to the remaining allegations of the complaint, which were supported by the affidavit in opposition, is the procedure reprobated in *Sprung v. Jaffe*, 3 N. Y. 2d 539, reversing a unanimous affirmance by this Court, without opinion, of an order granting summary judgment.

Affiant therefore contends that plaintiff was denied due process of law in violation of his rights under the Fifth and Fourteenth Amendments of the Constitution. He accordingly asks that the order of this Court state that the constitutional question was presented and necessarily passed upon.

WHEREFORE, affiant demands that an order be made granting the present motion for reargument or, in the alternative, leave to appeal to the Court of Appeals; that the order state, as requested, that the constitutional question was presented and necessarily passed on; and such other and further relief as may be proper.

EDWARD T. ROEHNER

Sworn to before me this
4th day of June, 1963.

Bert J. Libien
Notary Public, State of New York
No. 31-7541900
Qualified in New York County
Commission Expires March 30, 1964

APPENDIX E

ORDER OF APPELLATE DIVISION DENYING LEAVE TO APPEAL

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 25th day of June, 1963.

PRESENT—HON. CHARLES D. BREITEL,
Justice Presiding.
" JAMES B. M. McNALLY,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER,
" ARON STIEGER,
Justices.

EDWARD T. ROEHNER,
Plaintiff-Appellant,

vs.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,
Defendant-Respondent.

The above named plaintiff-appellant having moved for leave to reargue his appeal from the order and judgment of the Supreme Court, New York County, entered on January 30, 1963 and February 26, 1963, which order and judgment were unanimously affirmed by order of this Court, entered on May 16, 1963, or, in the alternative, for leave to appeal to the Court of Appeals,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of

Edward T. Roehner in support of said motion, and the affidavit of Anthony S. Genovese in opposition thereto, and after hearing Mr. Edward T. Roehner for the motion, and Mr. Anthony S. Genovese opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

Enter:

VINCENT A. MASSI,
Clerk.

APPENDIX F

ORDER OF COURT OF APPEALS DENYING LEAVE TO APPEAL

STATE OF NEW YORK,
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Third day of October A. D. 1963.

PRESENT: HON. CHARLES S. DESMOND, Chief Judge, presiding.

M. No. 541

EDWARD T. ROEHNER,

Appellant,

vs.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs.

GEARON KIMBALL,
Deputy Clerk.

[SEAL]

Office Supreme Court, U.S.
FILED
JAN 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 687.

EDWARD T. ROEHNER,

Petitioner,

vs.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

Question Presented.

Did the entry of judgment dismissing petitioner's complaint on the merits violate petitioner's rights under the due process clause of the 14th Amendment of the United States Constitution?

Statement of the Case.

Petitioner seeks review of the order of the Appellate Division First Department of the Supreme Court of the State of New York which unanimously affirmed: (a) the order of Special Term (Capozzoli, J.) of the Supreme Court of the State of New York entered in New York County denying petitioner's motion for summary judgment and granting respondent's motion for summary

judgment and (b) the judgment entered thereon dismissing petitioner's complaint on the merits.

Petitioner, as a member of respondent, The Association of the Bar of the City of New York, brought an action in the Supreme Court of the State of New York, New York county, in September, 1962, seeking to enjoin respondent from continuing to collect an increase in dues authorized by an amendment to respondent's constitution adopted at a stated meeting in March, 1957 (R. I, 9-11). The basis of petitioner's claim was that the members were deceived as to the need for the increase and induced to vote for it by false statements as to respondent's income and surplus. Issue was joined by respondent's answer in which respondent categorically denied the charges of fraud (R. 9-11).

Promptly thereafter respondent moved for summary judgment on affidavits of its Secretary (with attached copies of various records of respondent), its President from 1956 to 1958 (with attached copies of reports and minutes) and its Treasurer from 1956 to 1960 (R. 16-36), with copies attached to the former Treasurer's affidavit of the respondent's 1956-1957 budget and of the Lybrand, Ross Bros. & Montgomery report as to their examination of the respondent's "balance sheet and related statement of income, expenses and surplus of defendant [respondent] for the year ending April 30, 1956" and "the balance sheet and statement of income, expenses and surplus accompanying their report." On the basis of his own affidavit and four printed extracts from his periodical, *Editor & Publisher*, of which he is Editor-in-Chief, petitioner cross-moved for summary judgment for the injunction prayed for in the complaint (R. 37-75). Justice Aurelio in denying the cross-motion and granting summary judgment to respond-

ent (R. 81) found that petitioner's papers were "replete with many extraneous matters, which are completely irrelevant to the issues raised between the parties", and were "lacking in evidentiary facts which are necessary in order to defeat the motion of the defendant."

On appeal the Appellate Division unanimously affirmed without opinion, and both the Appellate Division and the New York Court of Appeals denied leave to appeal to the Court of Appeals (Appendices to Petition C, E and F).

Argument.

The petition does not in any way support petitioner's assertion (p. 11) that the Supreme Court, New York County—in defiance of the record and of the due process clause of the Fourteenth Amendment of the Constitution of the United States—granted respondent's motion for summary judgment; and, not content with that, has gravely injured petitioner's reputation as a lawyer by rebuking him for having brought baseless charges of fraud against respondent."

This litigation, which was commenced in September, 1962, had its genesis in 1957 primarily in a difference between petitioner and other members of respondent as to whether reserves for extraordinary repairs and contingencies totalling $140,191.75 should be treated as "surplus", and ultimately as to whether a dues increase was necessary. The notice to members of a stated meeting to be held on March 12, 1957 had had attached to it a summary of Income and Expenses for the years ending April 30, 1947, 1952 and 1957 (budget figures) which showed that as of May 1, 1956 no surplus had been accumulated

and that the budget (R. 25, footnote (a)) for the then current fiscal year showed a deficit of $5,000 (R. 20-25). As shown by the minutes of such stated meeting, at which the proposed amendment increasing dues was considered and adopted, petitioner stated his position as to surplus and income and his opposition to increasing dues (R. 28-30). The minutes also show that the respondent's then treasurer reviewed its income and expenses, particularly for the first ten months of the fiscal year 1956-57, and explained the basis of the figures which petitioner had questioned (R. 28-30). With the facts, and both sides of the argument, thus laid before them the members voted overwhelmingly for the dues increase (R. 31) and at least up to November 20, 1962, the records of the treasurer's office showed no protest to payment of the increased dues (R. 36).

It was thus upon the minutes of the above-mentioned March 1957 stated meeting and other unchallenged records kept by respondent in the regular course of business, and the complete lack of evidence to support petitioner's charges of fraud that Special Term denied petitioner's motion for summary judgment and granted judgment dismissing the complaint (R. 78-81).

Petitioner's charge that he was rebuked for having brought the action is not a ground for granting certiorari. We submit there is nothing in the record to sustain the charge. In the only opinion written, that of Justice Capozzoli, the court simply, and properly, found that the most that could be said of petitioner's position was that it presented "a difference of opinion as to how the accountants should have listed the items in question"; that such a difference would not sustain an action for fraud (R. 80); and that "conclusory allegations and unsupported charges do not take the place of evidentiary facts" (R. 81).

Conclusion.

The petition for a writ of certiorari should be denied.

Dated: January 7, 1964.

Respectfully submitted,

Lyman M. Tondel, Jr.,
Attorney for the Respondent,
52 Wall Street,
New York 5, New York.

James H. Halpin,
Of Counsel.

Office Supreme Court, U.S.
FILED
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No. 685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

EDWARD T. BOEHNER,

Petitioner,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

EDWARD T. BOEHNER
347 Fifth Avenue
New York 16, N. Y.

In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 687

EDWARD T. ROEHNER,

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v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests the Court to reconsider its order denying his petition for writ of certiorari and on such reconsideration to grant the petition. In support thereof petitioner submits the following grounds available to petitioner and not previously presented.

I

After filing an appeal to the Appellate Division, First Department, from an order of Mr. Justice Marks, Supreme Court, New York County, refusing to review the taxation of costs by the clerk, petitioner filed an affidavit with the Appellate Division, First Department, in which he asked that Court to recuse itself from hearing the appeal. The affidavit stated, at page 7, that a majority of the panel that affirmed without opinion the order by Mr. Justice

Capozzoli granting respondent's motion for summary judgment were judicial members of respondent (and that so were the three other members of the Court), that it would be charitable to call the opinion of Mr. Justice Capozzoli an aberration, and that his order was not rationally supportable; at page 5, that the Appellate Division, First Department, forfeited respect by its conduct in this case; at page 6, that the order of Mr. Justice Marks was not rationally supportable, and his memorandum opinion very odd, since he must have known better; at page 7, that no disinterested court could possibly affirm the order, but that petitioner did not believe he could possibly get a fair review from the Appellate Division, First Department; and, at page 8, petitioner therefore asked that Court to transfer the appeal to another Department. There is no oral argument on motions in the Appellate Division, First Department. The motion was denied on October 1, 1963, without costs. A certified copy of the affidavit and of the order are being filed, simultaneously herewith, with the Clerk of this Court.

The Appellate Division, First Department, could not properly sit on the appeal from the order of Mr. Justice Capozzoli, since six of the eight members of the Court were judicial members of respondent; it should have transferred the appeal to another Department. This was the procedure followed by the Appellate Division, Second Department, in *Brooklyn Bar Ass'n* v. *Kings County Bar Ass'n*, 258 App. Div. 920 (1939), in which, a majority of the members of the Court being members of the plaintiff bar association, the Court disqualified itself and transferred the appeal from the order denying defendant's motion to dismiss the complaint to the Appellate Division, First Department. Instead, the Appellate Division, First Department, made a mockery of the judicial process to protect respondent; so much so, that, as stated above, petitioner said in an affidavit filed with that Court that it had forfeited respect by its conduct in this case.

Where, as here, petitioner tells the Appellate Division, First Department, by affidavit, without rebuke by that Court, not even by an award of the customary costs against him, that the order of summary judgment against him was not rationally supportable, that it would be an act of charity to call the supporting opinion by Mr. Justice Capozzoli an aberration, and that the Appellate Division, First Department, has forfeited respect by its conduct in this case, it can only be because the Appellate Division, First Department, knows that petitioner has not had due process of law.

Respectfully submitted,

EDWARD T. ROEHNER

Dated: March 4, 1964.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the rules of this Court.

EDWARD T. ROEHNER